IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

RSA No. 1310 of 2006
Date of Decision: 5.2.2007

Shanti Devi and others ...Appellants

Versus

Smt. Tarawati and another ....Respondents

Coram: Hon'ble Mr. Justice Hemant Gupta.

Present: Shri V.K. Jain, Senior Advocate, with
Ms. Divya Sharma, Advocate, for the appellants.

Shri Arun Jain, Advocate, and
Shri Rakesh Nehra, Advocate, for the respondents.

HEMANT GUPTA, J.

The defendants are in second appeal aggrieved against the judgment and decree of by the Courts below arising out of a suit for specific performance of an agreement of sale dated 11.7.1995.

The plaintiff has sought such decree with the assertions that land measuring 33 kanals 2 marlas was agreed to be sold for a sum of Rs.4,50,000/- after receiving a sum of Rs.2 lacs as earnest money. The balance was to be paid to the defendants at the time of the execution and registration of the sale deed, which was to be executed on or before 30.4.1996. It is the case of the plaintiff that she was ready and willing to perform her part of the contract but defendant No. 1 in collusion with other defendants executed and got registered sale deed dated 8.2.1996 in favour of defendant Nos. 2 to 4, the present appellants. The said sale is illegal, null & void and not binding on the rights of plaintiff because all the defendants were having the knowledge of the agreement executed by Smt. Shanti

defendant No.1 in favour of the plaintiff.

Defendant No. 1 and defendant Nos. 2 to 4 filed separate written statements. The execution of the agreement in favour of the plaintiff dated 11.7.1995 was denied by defendant Nos.1. It was pointed out that in fact, defendant No.1 has sold a plot through registered sale deed in which Surinder Singh son of the plaintiff and one Narpat, are the the attesting witnesses. The said Surinder Singh has obtained thumb impressions of defendant No.1 by a fraud and misrepresentation and the same have been used for an agreement of sale. She denied receiving any amount as earnest money and asserted that the sale deed dated 8.2.1996 is a valid one. Defendant Nos. 2 to 4 asserted therein that are bona-fide purchasers for value and consideration.

The plaintiff in evidence produced Exhibit P.1 agreement dated 11.7.1995, which agreement was sought to be proved by PW2- Narpat Singh and PW4-Surinder Singh, the attesting witnesses. On the other hand, the defendants produced Exhibit D.1, agreement dated 12.5.1995 and the sale deed dated 8.2.1996 Exhibit D.2. Both the Courts have found that the execution of the agreement dated 11.7.1995 has been proved from the testimony of PW4 Surinder Singh, the power of attorney holder of the plaintiff.

The plaintiff has also examined PW1-Satbir, scribe of the agreement, who has deposed that the agreement was scribed on the asking of the parties, which was read over and explained to them and in token of correctness therefore, the parties and the witnesses put their thumb impressions on the agreement to sell. He also deposed that a sum of Rs.2 lacs was given to the defendants as earnest money and an entry in that

respect was made in the register. PW2-Narpat and PW3-Ajit Singh have corroborated the statement of PW4-Surinder. The plaintiff also examined PW5-Prem Lata, wife of the deceased Permanand, the stamp vendor, who has deposed that the stamp paper of the agreement to sell Exhibit D.1 dated 12.5.1995, is not sold by her husband and the same is not signed by him. PW6-G.K. Behl, was produced, who has deposed that the stamp paper for an agreement to sell Exhibit D.1 was not sold by Permanand, as per his record.

On the other hand, the defendant-vendor appeared as DW1 and deposed that she entered into the agreement to sell, Exhibit D.1, at her residence at Nazafgarh after receiving a sum of Rs.1 lac. The sale deed Exhibit D.2 was executed on receipt of the balance amount of Rs.5 lacs. She denied having executed any agreement in favour of the plaintiff and receiving Rs.2 lacs. The defendants also examined Satyabir DW4, scribe of the agreement Exhibit D.1, who is resident of Jhajjar, whereas the agreement was executed at Nazafgarh. He has admitted in his cross-examination on 27.8.1999 that the agreement to sell Exhibit D.1 was reduced in writing on 12.12.1995 whereas on 10.1.2001, he deposed that the agreement was reduced in writing on 12.5.1995. DW2-Vijay Singh and DW3-Deva Singh are the attesting witnesses. Vijay Singh has admitted in his cross-examination that in an application for income tax clearance the particulars of the agreement to sell are not depicted.

After considering the evidence led by the parties, the learned trial Court found that Surinder Singh, the power of attorney holder, is competent witness to depose in Court in respect of the facts of the case. The agreement was executed in his presence. The Court found that the

agreement to sell Exhibit D.1 and the sale deed Exhibit D.2 are void. After considering the evidence led by the parties, it was held that the plaintiff was ready and willing to perform her part of the contract. The said findings were affirmed in appeal as well.

Learned counsel for the appellants has vehemently argued that the agreement Exhibit D.1 dated 12.5.1995 is an agreement prior to the agreement relied upon by the plaintiff. On the basis of the said agreement, the sale deed dated 8.2.1996 Exhibit D.2, has been rightly executed by Shanti Devi. It has been further argued that the plaintiff has not been able to show the source of payment of Rs.2 lacs as earnest money on the date of execution of the agreement Exhibit P.1 on 11.7.1995 nor any proof was adduced in evidence in respect of means of the plaintiff to make the payment of the balance sale consideration during the entire period i.e. from the date of the agreement dated 11.7.1995 till the filing of the suit, which evidence alone could prove the plaintiff's readiness and willingness to perform her part of the contract. Reliance is placed upon **N.P. Thirugnanam v. Dr. R. Jagan Mohan Rao & others, AIR 1996 SC 116.**

It was also argued that the plaintiff herself has not appeared as a witness though she is Sarpanch of the village and, therefore, adverse inference should have been drawn against the plaintiff. Reliance is placed upon **H.G. Krishna Reddy and Co. v. M.M. Thimmiah and another AIR 1983 Madras 169**, **S.K.M. Mohammed Amanullah v. T.C.S. Ramasangu Pandian & Ors. 1995(1) Civil Court Cases 208 (Madras), Vidhyadhar v. Manikarao and another 1999(3) Supreme Court Cases 573, Rattan Dev v. Pasam Devi 2002(7) Supreme Court Cases 441** and **Janki Vashdeo Bhojwani v. Indusind Bank Ltd. 2004(3)**

SCC 584.

Firstly, the agreement dated 12.5.1995 Exhibit D.1 is purported to be executed by Smt. Shanti Devi on receipt of Rs.1 lac. The said agreement is purported to be executed in favour of Birmati, the purchaser, of whom Shanti Devi, the seller, is mother-in-law. It has been found that the stamp papers for the purchase of the said agreement are not purported to be sold by Parmanand Sharma, as it has been deposed by PW5 Prem Lata wife of deceased Permanand. PW6 G.K. Behl has deposed that the said stamp papers were not sold by Shri Parmanand. Still further, Shanti Devi appearing as her own witness has deposed that Birmati had made payment of earnest money qua her share on 12.5.1995, whereas DW2 Vijay Singh, has admitted that Birmati was not present on 12.5.1995. The details of agreement of sale were not mentioned in the application for obtaining income tax clearance certificate. It has been further found that though the stamp papers are purported to be purchased from Nazafgarh, but it has not been explained as to why the agreement thereon same was scribed by Satyavir at Jhajjar. The photocopies of the entries in the register of scribe, show that empty columns have been left in the register wherein it is written that the agreement has been cancelled.

In view of the aforesaid circumstances, both the Courts have recorded a concurrent finding of fact that the agreement Exhibit D.1 is not proved to be executed. The sale deed dated 8.2.1996 is on the basis of the aforesaid agreement and in favour of near relation of Shanti Devi. The present suit for specific performance was filed on 19.2.1996 i.e. soon after the execution of sale deed in favour of defendant Nos. 2 to 4 on 8.2.1996. On the other hand, the plaintiff has proved the execution of the agreement

of sale deed Exhibit P.1, dated 11.7.1995. The scribe, both the attesting witnesses and the attorney of the plaintiff have categorically and clearly deposed that sum of Rs.2 lacs was paid to Shanti Devi at the time of execution of the agreement. An entry in respect of payment finds mention in the register of the scribe as well. Both the Courts have also recorded a finding that the execution of the said agreement stands proved. Therefore, in respect of agreements, it is finding of fact based on affirmation of evidence.

Learned counsel for the appellants has vehemently argued that the plaintiff, who is stated to be a Sarpanch of the village has not examined herself. In fact, instead her attorney has appeared as a witness. It is alleged that in fact her son was the witness of a sale in favour of one Hawa Singh. Making use of the illiteracy of Shanti, the son of the appellant has obtained her thumb impressions and used the same for the purpose of agreement.

However, I do not find any merit in the said argument. Mere fact that earlier a sale deed was executed by Shanti in favour of Hawa Singh, raises no presumption that her thumb impressions have been obtained by misrepresentation. Keeping in view the coherent statements of the attesting witnesses and scribe, it leaves no manner of doubt that the said agreement was executed by Shanti alone. In fact the subsequent conduct of Shanti shows that she has taken steps to frustrate the agreement on the basis of wrongly prepared documents. The sale is purported to be executed in favour of her near relations. Such conduct in fact, is a strong pointer to the fact that the plea taken by Shanti is not a bona-fide plea. Still further, the argument that the plaintiff herself has not appeared as a witness is of no consequence. She has examined her son on the basis of power of attorney.

The power of attorney Exhibit P.2 authorises her son to appear as a witness in respect of the land situated in village Patra. Her son was present at the time of execution of the agreement of sale as well. Therefore, the said witness is competent witness to appear on behalf of the plaintiff. The judgment of the Hon'ble Supreme Court in **Janki Vashdeo Bhojwani's case (supra)** has been considered by me in C.R. No. 5217 of 2004 (Satnam Chanan Vs. Darshan Singh) decided on 28.2.2006, wherein it has been held that in terms of the provisions of the Sections 182 to 188 of the Indian Contract Act, 1872, Section 118 of the Evidence Act, 1872 and Sections 1A and 2 of the Powers-of-Attorney Act, 1882, the attorney is a competent witness in terms of the valid agreement. Therefore, the said argument is not tenable in law. So far as the other judgments relied upon by the learned counsel for the appellants are concerned, the same are distinguishable and are not applicable to the facts of the instant case.

The argument that the plaintiff was not ready and willing to perform her part of the contract is again misconceived. It is a question of fact whether the plaintiff was ready and willing to perform her part of the contract. The plaintiff has clearly averred in the plaint that she was ready and willing to perform her part of the contract at all relevant stages and so is the statement of her attorney as PW4. It is not necessary for the plaintiff to actually the money before the Court to prove readiness and willingness to perform the contract. In fact, the conduct of the defendants shows that all efforts were made by the defendants to scuttle sale in favour of the plaintiff. Therefore, I do not find that anything more was required to be proved in the facts of the present case by the plaintiff in respect of her plea of ready and willingness to perform her part of the contract.

Both the Court have recorded concurrent finding of fact considering the entire evidence on record. Such findings are sought to be disputed by way reappreciation of evidence. I do not find any patent illegality or illegality in the findings recorded by the Courts below, which may raise any substantial question of law in the present appeal.

Hence, the present appeal is dismissed.

February 5 , 2007 (HEMANT GUPTA)
ds JUDGE